U.S. DEPARTMENT OF AGRICULTURE

AND

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

PUBLIC MEETING

ON THE

INTERIM FINAL RULE FOR SELECT AGENTS

Monday, December 16, 2002
9:06 a.m.

Cohen Auditorium
Wilbur J. Cohen Building
Voice of America Building
330 Independence Avenue S.W.
Washington, D.C.

P R O C E E D I N G S

MR. SPARKS: My name is Larry Sparks. I'll be moderating today. We've been delaying a little bit to try to get these lights killed up here so that you can see the presentations that we have planned for you this morning.

In the meantime, let me say welcome to this public meeting on our select agent rule and make a couple of announcements. There is no food and drink allowed in the auditorium. Secondly, we have a public comment period scheduled later after the break, and some folks have signed up to give their statements. We probably will have more time than we allotted. So if anyone here would like to in fact make a 2-minute public statement about the regulation, make comments to us, suggestions, if you will go to the registration table, you can sign up, and we will permit a last-minute signup on public comments, because there is in fact time available.

As I think most of you know, this regulation has been on a very fast track. It was

put on public display a week ago today in the Federal Register, up on the CDC and APHIS Web sites last Tuesday, and published in the Federal Register Friday. Because of the advanced notice and other things that are required for a public meeting, we sort of had to take a chance as to whether this public meeting would occur in a reasonable amount of time vis-a-vis the actual publication of the reg.

There's not as much time between those two events as ideally I think we would like to have and maybe you would like to have. But we decided to go ahead with this meeting today to offer an opportunity for you to hear some brief presentations this morning, giving some overviews of the two regs, an opportunity for public comment, and I'll say more about that in a moment. And also this afternoon, a question-and-answer period, with many of the people who were on the Interagency Work Group, who help devise many of the key policies that are reflected in these regulations.

This is just really the beginning of the

public comment period. There's a 60-day period. And you're not confined to today in making either an oral statement or if you have a written statement for the record, we will take that at the registration desk and put that in the docket room for public display.

This meeting we are in fact recording, and a transcript of this will be put in the public docket and put on display, so this is a part of that process.

As soon as we can get these lights killed, I'll be back, and we will try to get these overview presentations for you. Let me check on that.

[Break.]

MR. SPARKS: Okay, I think we're about to be able to take care of the lights.

I'd like to introduce to you Dr. Stephen Ostroff, who is the deputy director of the National Center for Infectious Diseases at CDC and is also the acting director of the Select Agent Program. He wanted to make a few welcoming remarks.

DR. OSTROFF: Thanks, Larry. Yes, I'll

just make a couple of quick comments to try to keep us on schedule.

I in particular wanted to--now they're making it dark, so I can't see my comments.
[Laughter.]

DR. OSTROFF: Well, we'll just wing it.

I wanted to, in particular, thank Larry and Mark Hemphill, who is also sitting up here, and all the other members of the Select Agent Program. It hasn't been a particularly easy 6 months. We've been trying to do a lot of things simultaneously.

For the program itself, we couldn't be certain of when the new act would actually be passed by Congress and would actually be signed by the president. We also didn't know exactly what it would look like. And as a result of that, and the fact that it was so prescriptive, in terms of the timelines that it set out, it's been a very difficult 6 months to try to meet all of the deadlines established in the act itself.

And I know for the user community that it's been an arduous 6 months as well, because

based on when the law was signed by the president, there were certain things that had to happen; for instance, over the summer months, such as the notification of possession process. And the revised list of select agents came out in August.

But I think that, given all the difficulties of trying to get this all done within the 6-month timeframe, things have actually gone, from our perspective, quite well in a number of different ways. Certainly, the response that we've had from the user community has been, for the most part, quite positive, in terms of feedback that we received regarding the revised list and in terms of the notification process as well.

And I do think it's important to point out that we did technically meet all of the guidelines that were set out in the act and had the interim Final Rule published and on display by last Monday.

It took a lot of hard work. I'd like to particularly thank the members of the Interagency Working Group that represented 21 different federal agencies, who provided a lot of the scientific and

technical input into the rule that hopefully all of you have had a chance to take a look at over the last couple of days.

I'd also like to thank our colleagues at the USDA. Again, based on what was written in the act, we worked very hard to make these two rules look as mirror image as possible, so that we could make it easier for the user community to actually implement the various components of the regulation. And I think that we've pretty much succeeded on bringing together two agencies which, at times, can look at various things from a different point of view. And hopefully that has been apparent to you, that we've tried to make the rules look as similar as possible between HHS and USDA. And I think over the long term, that will make it a lot easier for us to work together on the agents that are considered the overlap agents, so that we could make sure that we get applications processed, that we get revisions and amendments processed as rapidly as possible, and that we get through the next year to year and a half during the period

where, ultimately, we have to have a single rule and joint regulation established.

I'd also like to thank Rachel Levinson, Shanna Nesby, who is here, and Jonathan Richmond for assisting with the revision of appendix F of the BMBL, which provides guidance on what I'm sure will be another topic of discussion over the course of the day, which is the security requirements, and being able to get that accomplished and published as a supplement to the "Morbidity and Mortality Weekly Report" within the last couple of weeks.

This is an opportunity for you to hear from us about some of the details which might not be obvious to you from the actual reading of the regulations, which were published last week, and more importantly, for us to be able to enter into a dialogue and to hear from you about your thoughts about what's been written in the revised regulations.

We tried very vigorously to balance the needs not to inhibit the diagnostic work and the scientific work, which is going on and which we

anticipate will be going on at even greater levels over the next year, while at the same time fulfilling the spirit of what the crafters of the actual act in Congress intended in terms of trying to extend as well as shore up the safety and security of select agents. And I think that as we work through the process, we tried very actively to strike that balance. And I hope that all of you appreciate that we've tried to do that in a number of different ways, not only in the regulation itself, but in particular, in the phased implementation of the regulation, which will take place over the next year.

So with that, I think what we ought to do is try to get started with the program. I'll turn it back over to Larry, who will moderate over the course of the day.

Again, we're here to listen to your thoughts and comments. And over the next 60 days, hopefully we'll get some good comments back from the user community and be able to finalize a rule that meets our needs as well as yours.

Thank you.

MR. SPARKS: Okay, thank you, Steve.

Why don't we just go into this presentation and review, first of all, a couple of things that Steve alluded to, how we got here, remind you of the legislation which is something that was our total guidance in developing these regulations.

It was very prescriptive legislation, as you know. It was very detailed in terms of the kind of regulation we would publish, how quickly we had to do that. It prescribed that we would do a notice of possession system, creating a national database; that there would be a parallel security risk assessment by the Department of Justice of the entity and of the individuals who work in those entities; that the requirements of the Patriot Act as to who is in fact a restricted person would be one of the criteria that would apply to that security risk assessment; and anyone meeting one of those seven categories--convicted of a felony, et cetera--would in fact be excluded from working with

these agents; provided for us to make exemptions for certain kinds of facilities, diagnostic facilities, and others; set up allowing us to preserve the database from Freedom of Information, so that we in fact would not disclose this information--it is a classified database, I think most of you are well aware of that; also set up criminal and civil penalties. As I said earlier, it required to run a notice of possession and set up the stipulations that these in fact would be a compatible regulations put out by CDC and by USDA.

Those were all an excellent roadmap. The only problem, at least from my perspective as one of the people involved who was trying to follow that roadmap, was the time element of how quickly we needed to do all of this.

Next slide. For instance, in notice of possession or interim Final Rule, those are the deadlines that we were given in those activities. If we were going to do the notice of possession on a different timeline, we would have done some things like pilot testing, but we didn't have time

to do that. We had to come up with what we thought met the requirements in the legislation and put it out there, not giving folks much advanced notice, not giving them opportunities in professional meetings or other kinds of things to give them background and information that may be would have helped them comply on a more rapid and complete basis.

But in fact, every timeline there has been met with the exception that we've got 24 months to get out a joint regulation, so that timeframe has not come.

Next. We have not talked much about that notice of possession and did not want to spend a whole lot of time on it today, but wanted to give you some ideas as to some of the totals and some of the things that happened there.

We cast a very wide net and sent out to well over 200,000 individuals and entities a notice of possession that they in fact should reply. We got over 142,000 replies. We are still looking through and massaging that data, eliminating

duplicates and that sort of thing, but we will certainly be done with that. And we got about just over 1,800 entities or individuals who indicated that in fact they possess a select agent.

Now, keep a couple things in mind. The list of select agents that we used was that list in 42 CFR 72; in other words, the old list, not the new list. Secondly, that number does not take into account a couple of variables--first of all, the exemptions that the legislation provided for us. So that doesn't mean that all 1,842 of those will in fact have to come in and register and be certified in terms of operating under the new reg.

So we think that many of those facilities will in fact drop out and that that number will come closer to about 817 instead of 1,842, when we take into account all of the various exemptions that are allowed for under the regulation.

On the other hand, with new grants going out and research in this area, there will be some additional new facilities that will enter into the landscape that this regulation will impose. So

it's difficult to say in the end how many entities will be registered, but we think that the low number will be 800 and that the high number, and this is a very generous estimate, would be 1,000. That's based on the notice of possession activity.

Next slide. This is how that breaks out in terms of those entities, in terms of academic, commercial, government and private facilities. The thing that that slide doesn't show you is that in terms of actual numbers of who possesses how many agents and so forth, that the government agencies would come out very differently if you looked at it from that perspective. But this is an overview for you, just to get a sense of that notice of possession. As I said earlier, we didn't intend to make this a long presentation about that. But we wanted to give you some feedback on that.

MR. MALAKOFF: Is that of the 1,800 or of 142,000?

MR. SPARKS: Reporting possession, of the 1,800.

Next slide. One of the things that we

spent an awful lot of time on in devising these regulations was that if you look back in the legislation, we were mandated to not, if at all possible, interfere with current ongoing research and education. We were in fact to provide for some phase-in, and that is a very complex entity, when we got to working with that.

The regulation is an attempt to balance off two competing objectives, if you will, ongoing research, not interfering with ongoing research and education on one hand, and facilitating that research; and then on the other hand, implementing a whole bunch of new requirements vis-a-vis safety and security, especially security, and bringing in a lot more people and a lot more facilities under the requirements to register.

So how do you balance that off? And this, in one slide, which is probably pretty dense, but we'll go through this and try to give you a sense of what that transition period is like. And obviously in the preamble and here today, we're going to ask for public comment on this period.

The rule was published last Friday, December 13th. The effective date of the regulations is February 7th, 2003. That's the effective date of the regulations. However, within those regulations, there are different applicability dates of different sections, when they come into play.

So that March 12th is when we anticipate that if you currently possess these agents, are currently doing research in these areas, you can continue to do so, as long as you meet the milestones that are laid out here in this timetable for phase-in, so that you must in fact apply for registration.

And by saying that, I'm also saying that you must re-register, that you must apply for registration by March 12th, 2003, in order to keep operating. When you do that, you will certify that those elements of the regulation that were applicable on February 7th, that in fact you meet them. And they are listed there very broadly in terms of safety, emergency response, training,

records, notification of theft and loss and so forth.

So you need to look at those sections in particular in the regulation, and recognize that when the responsible official fills out that part of that application, they're in fact certifying that their entity is in compliance with those sections.

That on April 12th, you will have to have applied to the Department of Justice for the security risk assessment for the entity itself and for the responsible official.

That on June 12th--I misspoke. You have to apply by March 12th for the entity and the responsible official. You must in fact then have had those completed on April 12th.

By June 12th, you're going to have to have the individuals who work in the facilities, you're going to have to have those reviews in and you're going to have to have that completed.

You're going to have to have a security plan developed by June 12th, implemented by

September 12th, including the training provisions of the security section.

And then, in fact, everything is going to be complete. You're going to have to be in compliance with all sections of the regulation by November 12th.

Now, I've zipped through this, and in fact it's pretty complex. But I think as you read through the regulation, if you can keep this kind of timetable in mind and recognize that it is in fact phased in, that in fact the security elements of this have to be locked up and that you have to be in full compliance with every element of the reg by November 12th, and as long as you keep on this timeline, as along as you apply for the risk assessments at the times required, complete them at the time required, have your security plan devised in the timeframe, and in fact implemented in the timeframe, that you can continue doing your research and other activities during the phase-in period.

After November 12th, it's over. After

November 12th, all the phase-in is over. You must in fact be in full compliance at any time you come in to register, to apply for registration.

Now I anticipate that as you think about that, there will be questions this afternoon that you may want to ask in the question-and-answer period about that. Maybe we can help you understand elements of it that I'm sure are perplexing at this moment because it is one of the more complicated elements here.

But in fact we wanted to provide a transition period, and we in fact welcome your comments on this during the comment period. If not today, during the 60-day period, please provide us your written comments and your reaction to this.

If you are not currently in this business, and you do not possess, you're not doing research, you're not doing education in this area, on February 7th, you're not entitled, very broadly speaking, to the transition. You're not transitioning. You in fact need to come into compliance at the time you apply.

And after November 12th, the transition period is over, and any application received after that point must be in full compliance with all sections of the regulation.

So that I think will be discussed in many forms. We'll take questions on that this afternoon. And as I said earlier, we welcome comment.

Mark Hemphill, who is our chief of policy in the Select Agent Program, will take you through some of the other aspects of the reg now. And then following that up, APHIS will talk about their regs.

So that's our agenda this morning. Mark?

MR. HEMPHILL: Since the heart of the regulation is really the list of agents, I'll start with that and give kind of a brief overview of how we got to the final list that's in the Federal Register notice that was published last Friday.

As Dr. Ostroff mentioned, in May of this year, CDC invited participants from 21 federal

entities to participate in an Interagency Work Group to make recommendations concerning various aspects of the select agent rule. One priority of that work group was to review and make recommendations on the select agent list based on the criteria specified in the act. These recommendations from the work group were published in a Federal Register notice on August 23rd seeking public comment.

The substantive changes that were listed in that Federal Register notice compared to the previous list was the removal of yellow fever virus, of viruses causing hantavirus pulmonary syndrome and the removal of aflatoxins.

In that notice, there was a recommendation that monkey pox and herpes B virus be added. There were also changes to reflect current taxonomy or to more precisely define the intent of what was to be regulated.

There were a number of comments that were in general favorable to the changes on the list but generated a number of comments associated with

whether primates naturally infected with herpes B would be subject to this regulation. This was the result of us publishing a list without the context of what the exclusions or exemptions will be. And as you'll see in a moment, we specifically exclude animals that are naturally infected with any of the listed agents from being subject to the requirements of this regulation.

Next slide, Larry. In addition to the viable agents on the list, we also had a subcommittee look specifically at the issues associated with the toxins. As some of you who have select agent toxins are aware, currently we regulate those toxins based on potency or LD 50 values. A recommendation was proposed that was published in the Federal Register notice that took into account not just the potency of the toxin but also factored in the quantity of toxin that was at a facility or entity.

The initial Federal Register notice had specified that the amounts to be utilized in determining whether one was excluded from the reg

or not was the total amount within an entity.

A number of comments were received that pointed out that within large institutions, this could unfairly penalize those institutions where they could have a number of principal investigators that would have exempt quantities but in their totality would then cross a threshold. So in the interim Final Rule, we have taken those comments and changed to reflect that what will be required as far as establishing those threshold quantities will be based on the principal investigator, that amount that's under the control of a principal investigator within a facility.

Next slide, Larry. Also Amy Patterson, the director of the Office of Biotechnology Activities, led the Interagency Work Group on a number of discussions concerning issues we faced with genetic elements and recombinant organisms. And in the Federal Register notice, we had made a number of proposed changes to how we would be regulating those agents.

In bullet 1, it addresses viral nucleic

acids. And in the original Federal Register notice you may recall that the wording was to the effect of full-length nucleic acid from any of the viruses listed. We received a number of comments that potential loopholes could exist if you were to do a single point mutation. You no longer had, technically, the full length.

So we reassessed what essentially what we were trying to focus on, and that is the ability to create, through the genome of one of the viruses, the ability to replicate more of it through some sort of recombinant technique. And we believe in number 1, where we've specified nucleic acids that are either synthetic or naturally derived, that are either contiguous or have been fragmented and then reassembled, that if they encode for an infectious or replicative competent form of any of the select agents viruses listed is what we're intent on regulating here.

So viral nucleic acid extracted in and of itself would not be subject to the requirements of the select agent rule. It would be dependent upon

it to be put into a system as noted there, where there's the potential to produce replicative forms of the virus.

Likewise, with bacteria, in the Federal Register notice, we have published verbiage to the effect of encodes for a virulence factor sufficient to cause disease. We received a number of comments about virulence factor sufficient to cause disease of being vague, undefined and these factors usually are highly dependent on the biological context.

As a result, the work group then reassessed and concluded that really the only encoded molecules that would fit the criteria of sufficient to cause disease on a consistent level would be those toxins that would be expressed from those organisms. So that's what we've done with bullet 2, is we've changed the Federal Register notice of August 23rd to reflect, then, that nucleic acids--again, either synthetic or naturally derived--that encode for the functional form of any of the toxins that are listed on the list. And again, we've retained, then, that genetically

modified organisms from the list would also be regulated.

Next slide, Larry, please. We also recognized that even though an agent may be on the list, it may be in a form either through quantity or through the way it's treated that no longer meets the criteria of being on the list, of being a severe threat to public health and safety. And so we provided for a number of exclusions from the list of agents.

The next slide, please. Those exclusions are against agents or toxins in their naturally occurring environment provided that it's not been intentionally introduced, cultivated, collected or otherwise extracted from its natural source.

So, again, for herpes B virus, naturally infected primates, then, would not be subject to the requirements of the regulation.

We also noted that if the agent on the list had been treated in a manner in the case of an organism have been gamma radiated or otherwise treated so that it's no longer able to replicate in

the appropriate host system or medium, then, again, it would not meet the criteria of causing diseases and being a severe public health threat.

So we recognized that dead agent, inactivated agent or nonviable agent would not be subject to the requirements of the regulation. And likewise, for toxins that have been treated in a manner that changes the confirmation so that it no longer has the original toxic properties would not be subject to the requirements.

We provided in the regulation the ability for attenuated strains of agents that have documented history of being safe, to allow for the application of those to be considered to be excluded from the list. And we provided details on how to provide that written request to our office or likewise, when it's an overlap agent, to USDA.

And, again, I've already gone through the threshold amounts concept for toxins, where toxins of less than what's specified in the regulation would not meet the criteria determined by the work group to pose a significant threat to public health

and safety.

This afternoon, we hope to have the chair and co-chairs of the various groups from the Interagency Work Group available to answer any specific questions you have on how we came to the final list that we have published.

Next slide, please. And then just kind of a summary of what's on the list, at least from Department of Health and Human Services or CDC's oversight. Those that are strictly of CDC-listed agents, there are 20 agents. And almost an equal number, 19, that appear on both our list and the Department of Agriculture list, the so-called overlap list.

Next slide, please. There are a number of exemptions in both our regulation and USDA's. These stem directly from the public law. The exemptions are in one of four cases.

The first one being for clinical or diagnostic laboratories in which the agent is used for either diagnosis, verification or proficiency testing purposes, provided according to the statute

that after that activity is done, that that agent and that specimen be either destroyed onsite or transferred to a registered facility and that the appropriate authorities are notified of the identification of that agent.

There's also a provision to exempt products that have been either cleared, approved, licensed or registered under one of various federal acts. This would primarily pertain to licensed vaccine strains that are used for the purposes of the act in which it was licensed or approved.

There is also the provision for investigational products, for the application of those to be considered for exemption. We have a specific form that both the USDA and ourselves have agreed upon that will be utilized as a single form to submit for applying for these investigational products to be exempted if they're covered under one of several federal acts for those purposes.

Lastly, there is the provision for an emergency provision for either a public health or an agricultural emergency, to apply for an

exemption in those cases where allowed according to the statute to grant a 30-day exemption followed by one renewal of 30 days.

The next slide, Larry, please. Just quickly to walk through some of the other components of the regulation. Again, as with the current regulation, there is the registration of the facility or the entity that possesses, uses or transfers now, as according to the new statute, any of the listed agents.

There is the requirement that those individuals that the entity or the facility has identified as requiring access to those agents, that they undergo an electronic database check performed by the Department of Justice. That database check essentially will be checking to determine whether those individuals are a restricted person as specified in the USA Patriot Act. And if so, they are denied access to the agent. There area a number of other provisions in the act that also require Department of Justice to check on, things of the nature, for instance, if an

individual has been associated with a group supporting terrorism or, I believe, some other federal criminal statutes as well.

We retain, again, the concept of an individual serving as the point person for a registered facility. This person must be the one who has been authorized by the facility or entity to represent the entity for compliance issues related to the regulations.

We require that since this individual will have to certify compliance with the requirements, that they will also have to undergo, then, the Department of Justice electronic database check as well.

There is, again, provisions for developing a safety plan and essentially consider the same requirements as is currently listed in our current regulation. Those in developing a safety plan include of course the biosafety microbiological and biomedical laboratories, or BMBL, the NIH guidelines, and of course for toxins, as we currently require, the OSHA standards that are

applicable for work with toxins as well as the appendix I of the BMBL.

We also have a section on developing a security plan in our reg. These provisions listed in this section of the reg contain what we feel are common-sense principles and meet the obligations of the act's mandate to establish security requirements for the purposes of protecting public health and safety, and to a large extent, are directly taken from the laboratory security guidelines published December 6th in the CDC publication "Morbidity and Mortality Weekly Report."

Next. We also have provisions in the regulation for when an incident occurs, where the appropriate safety requirements have not been followed, such as if there is an incident, a spill, a release, a requirement to have plans in place to protect the public health in such events. We have a component requiring training of staff to ensure that the staff are aware of the hazards in the workplace and have been fully trained on the safety

and security requirements for their institute where they'll work.

The transfer section has been modified somewhat. The biggest change to that is a requirement of prior approval from either the USDA or CDC before a transfer can take place. This allows us to validate that both parties involved in the transfer hold a current registration for the agents that are intended to be transferred.

There's record-keeping provisions in the new regulation as well. There are provisions for toxins, for inventory and quantization of those toxins. It's recognized that an inventory of a quantity value would not be meaningful for viable agents, and so we've focused then on documentation of who has access to those agents at what period of time, for viable agents. And that is what we are stressing there, as the appropriate mechanism of assuring oversight and record-keeping for restricting access.

Lastly, there is a requirement in the act for the notification of either a theft, loss or

release of an agent. This also is incumbent upon on us to provide this information to Congress on an annual basis.

Next slide. Some of the impacts we expect from this new regulation, actually the first one, we do not expect to have, actually, a major impact. We believe that most facilities should already be complying with the appropriate guidance that's nationally recognized or the OSHA regulations in regards to toxins. We feel that obviously the new components of restricting access from both a personnel and physical security are going to be important impacts upon the community that's subject to these regulations.

And of course, there is the requirement, then, for the overlap agents, that facilities meet both CDC requirements as well as USDA's requirements. And to that end, for the last 180 days, both CDC and USDA have been working extremely closely to try to make those requirements as close and consistent as possible.

Next slide, please. And further in

discussing, then, the coordination with USDA, there's a recognition in the statute that for those agents that appear on both lists, that the community has then the discretion to decide which agency they will submit their application packet to. The application packet is a single packet agreed upon by both agencies. The statute and our understanding with the Department of Agriculture is that on the overlap list, regardless of which agency it goes to, it will be shared with the other agencies to ensure that it meets the requirements of that other agency and will obtain concurrence from that other agency before the actual registration certificate is issued.

Next slide, please. Lastly, as Larry mentioned, we are seeking comments for the next 60 days, until February 11th, I believe, on specific provisions listed in the new CDC regulation. And I've listed those appropriate contact places for sending your written comments to, and also where the docket room information is for contacting for receiving materials that are placed on display in

the docket room.

Thanks very much.

MR. SPARKS: Okay, this information is also available out at the registration table. Various documents that Mark mentioned in his presentation, there are samples out at registration. And if you would like a copy, and don't currently have one or need access to it, you can sign up and we'll furnish you with copies of those various things.

I was reminded here that comments are also invited on the proposed data collection instrument. As Mark mentioned, we have a common registration package that will be the same whether you go to Agriculture or CDC and will be shared between the two agencies, and that we in our preamble ask for comments.

Written requests for comments on the data collection instrument should be sent to Anne O'Connor, the assistant reports clearance officer. And this is in the reg. And the address is there in the rule. They should be sent to Ms. O'Connor.

This is a 30-day comment period.

And she's here today. She's the one that brought the note.

Anne, just raise your hand, so that they can see that you're here.

If you would like to discuss this further with her, you can.

I think one of the things that's apparent from the comments that have been given earlier today, that a partnership with USDA was absolutely essential in getting us to this point. And Kevin Shea, who is the director of the policy and program develop for APHIS is here, and he's going to talk about their regs.

So I'd like to welcome one of our partners. Thank you.

MR. SHEA: Thank you, Larry. I'm just going to make a few comments before Dr. Spencer makes a presentation similar to the one Mark made.

The Congress provided that we would have two separate rules. But it became pretty clear that if we were going to serve the community well,

we had to have these rules be subsequently virtually identical, and we think we've done that.

If there's any doubt about the purpose of that, I think was erased when we had the notification of possessions returned to us and there were only 44 animal agents that were not overlap agents. So clearly, there's an overlap of interest here. And we've think we've made these rules substantively identical.

Stylistically, they probably look different. And we have 18 more months to figure that out.

The scientists were able to get this part straight. We hope the lawyers and the writers will do as well with the next 18 months.

So I'd like to introduce Dr. Denise Spencer, a senior staff veterinarian with our Veterinary Services Unit, and she will talk about the agriculture rule.

DR. SPENCER: Thank you. Good morning, everybody. I am Denise Spencer, senior staff veterinarian with the Veterinary Services in USDA.

I've been working closely with the people at the CDC on our reg. And today I'm just going to give you an overview, a fairly general overview, of what is in our reg.

The purpose of the act itself is to prevent or respond to bioterrorism and other public health issues. After September 11th and the anthrax issue, Congress asked who had access to anthrax and nobody could give them a good answer. And so, as a result, they worked on the Public Health, Security and Bioterrorism Preparedness Act.

It was signed into law on June 12th by the president. And subtitle B is the Agricultural Bioterrorism Protection Act of 2002.

The requirements of the act were to, first, develop the list of biological agents and toxins for USDA, since we didn't already have a list comparable to what the CDC had for their select agent list. Then we had to have a method of notification of possession for those agents; develop the registration for possession, use and transfer, which is what the new reg does; and it

also provided for certain exemptions to the requirements to be in the regulations.

I just have here, for your information, the citations in the regulations for the different parts. The Veterinary Services part is for the animal pathogens, which would include the overlap agents. With the CDC, it's in 9 CFR 121. Our plant protection and quarantine section also has a list of agents that impact plant health or plant products, and that is found in 7 CFR 331.

And I think I have the wrong citation for you. I think that's the OIT one. Okay, 42 CFR 72.

In the development of our USDA list for animal pathogens, we used several criteria, primarily. There were several given in the law itself, and then we had discretion to use other criteria that we felt were important to agriculture.

The first, the effect of exposure to the agent on animal health, pathogenicity, the ability to treat the disease or detect it. Also, economic impact was a big factor for USDA agents. And those

agents that have the largest impact were reflected in the OIE list, A and B. Also, we looked inclusion on the Australian Group list, which are agents that have been known to have been weaponized.

This is our list of agents. These are the overlap agents that both the CDC and USDA regulate. And then these are just strictly Veterinary Service agents.

Then PPQ had a separate list of criteria that they used to develop their list of agents: the effect of exposure on plant health and plant products; their ability to detect the agent at an early stage in collection is very important to them. If that's difficult, then there's the opportunity for that to spread without notice. They also were interested in regulating only exotic agents and the economic impact importance of the host.

So if it's like wheat, then that would be more important to them because it's such a huge cash crop for agriculture.

This is the list of the USDA PPQ agents. And certainly CDC and VS do not regulate those. But they have, like I said, part of the reg.

About the list, the Agriculture list will be reviewed and updated at least biennially. And for the overlap agents, we will have concurrence with the CDC on any inclusions or exclusions or exemptions or removals for those agents. Also, we will accept requests for attenuated agent strains to be excluded from the list, and that is a written request that we will review. And APHIS and CDC must concur on agents that are included on the overlap lists for them to be excluded.

The first phase of the law was notification of possession that required that people notify the secretary of Agriculture if they possess any of those agents. Notification of the secretary of Department of Health and Human Services by September 10th and all the forms that were processed for that went to a contractor at a central location.

During that initial phase, we had an

exclusion for persons that possessed products that were, contained or bore listed agents or toxins, and that had been cleared, approved or licensed under the Food, Drug and Cosmetic Act, the Virus, Serum, Toxin Act, or the Federal Insecticide, Fungicide and Rodenticide Act.

Notification of possession is finished so that it is not longer a requirement for people to submit those forms to us. And registration applications will be sent to people who responded positively that they did possess agents, and also to those people who did not, failed to respond to the initial mail-out.

And here I just wanted to give you an overview, a comparison of the difference between what we currently view for the permitting system and the registration system, how they're different. Registration is for people who possess, use or transfer any of the high-consequence livestock pathogens or toxins, also for the listed plant agents or the select agents.

Laboratory inspection will be required for

those agents. Security risk assessment is required for both the entity and the individual, which is the database background check that the Department of Justice will be doing. Also a security and biosafety plan is required under the new registration procedure.

For the permitting, what we currently do is for the importation or transport between states, any livestock pathogen, we require a permit be issued by APHIS. And for certain agents on that list, including the high-consequence livestock pathogens and toxins, an inspection is required. There are some agents, like West Nile virus, that also require an inspection but are not on the list.

So any of these that possess, use or transfer any of the high-consequence livestock pathogens or listed agents must register with USDA APHIS. For the overlap agents, people have the option of either registering with the Centers for Disease Control or with APHIS.

Entities that possess, use or transfer overlap agents must register with either but not

both. And also, there are some cases where people who transfer agents will not need to be registered, and that would be, for example, in the case of clinical or diagnostic labs that have isolated one of the agents from a sample. They are allowed to transfer that to a registered facility without themselves having to go through the registration process.

Registrations will be valid for a maximum of 3 years. After that time, they can be renewed.

Okay, then I wanted to just give you a general overview of the process, some high-level stuff.

First, the entity has to designate a responsible official, the person who will be the contact person, as Mark mentioned in his talk. There is the option for facilities to also select an alternate responsible official who will act in the place of the RO. The RO has to submit their personal information to APHIS and also to the DOJ, for their security risk assessment, not only for themselves but also for their entity, for their

company.

After they get approval from APHIS and Justice, it'll come through us from Justice, then the RO will be responsible for submitting the names of individuals that have a legitimate need to have access to the agents and also have the appropriate training to handle the agents.

Along with that, the RO will have to submit the information about the facility, include the biosafety levels for the different labs and the equipment that they use, as well as information about the agent, which agents they have and where those agents are stored and used.

The RO is responsible for seeing to the development of an implementation of the safety and the security plans.

As guidance, we have references for the biosafety and security plans. I think Mark probably mentioned these in his talk, the biosafety and microbiological and biomedical laboratories, the BMBL. We also have the USDA security policies and procedures for biosafety level 3 facilities.

And that's available at that Web site, as well as appendix F.

I think they already went over the implementation. They're the same.

Transfers for the overlap agents, everyone will continue to use the EA-101 until March 12th. For APHIS, where we didn't have a requirement to track those, the new form APHIS 2041 will be used for the strictly USDA agents, so it's both plant and animal. And after March 12th, everybody will go to the 2041, which also a CDC number. It's the identical form.

Okay, I just wanted to touch briefly on exemptions. I know Mark already mentioned them. Diagnostic and clinical facilities will be exempted under the USDA reg as well, provided they report the identification of the agent and inactivate or transfer the agent to a registered entity within 7 days after identification. We are allowing for 90 days for proficiency testing for the different laboratories. And facilities that maintain positive controls viable agents are required to

register.

Products that are contained or bear listed agents or toxins and that have been cleared under those acts that I mentioned before--FD&C, VST or FIFRA--are exempt from the registration requirements, unless the administrator feels that it's necessary to have additional regulation of those agents or toxins in an effort to protect animal or plant health.

Exemptions for experimental or investigational products is by application. And they must be authorized under a federal act. There's a form to do that, the APHIS 2042. And a determination of whether to grant or deny an exemption will be made within 14 days of receipt of the complete package, the completed form.

Civil penalties, I don't know if they went over that. Violations of any provisions in the regulations allow for penalties of up to $250,000 for each person or individual that violates it, and up to $500,000 for the entity. People who transfer an agent to someone who is not registered, that's

knowingly, will also be subject to the same fines and possibly subject to up 5 years of imprisonment.

And people who receive the agents and are not registered are to subject to the same civil penalties.

And this is just Web addresses where you can find additional information on our rules and find the form and things like that, contact information.

Okay, I am at the National Center for Import and Export, so you can reach me at that phone number. The plant protection and quarantine people are also in Riverdale. That's their phone number. You can speak to Dr. Bob Flanders regarding any plant issues that you have or about the agents. And then you have the CDC information.

MR. SPARKS: We've made the copy of the PowerPoint presentation that CDC made available, and we'll get Denise's copy and make some copies. So if folks want to get some of those details, didn't get notes made or whatever, they can do that.

We're running behind, but I think there are places where we'll make up for this later. So we are prepared at this point to take a break until 10:45.

[Break.]

MR. SPARKS: Okay, I'm going to call the names of those who have asked to speak. It's a 2-minute limit. I'm going to call them in alphabetical order. I have a timer here, but I don't want to really have get into slamming down the gavel and that sort of stuff, so I'll just ask each of you to come to the podium when your name is called, identify yourself. If you're representing an organization, please state that, so that we can get that appropriately recorded. If you're representing yourself, that's fine, too. There's no difference here.

This obviously is not your only opportunity to comment. It's the only opportunity to make a public statement. We'll take a copy of your written remarks if you've got them and put them in the public record. If you have additional

comments that go beyond your public remarks, we'd be happy to take them and put them into the public comment record.

So the first person in alphabetical is Ronald Atlas. Please use either podium here that you might want.

MR. ATLAS: Good morning. My name is Ronald Atlas. I'm president of the American Society for Microbiology, and I wish to offer these comments on behalf of the society.

Given the very short period of time that we've had to look at the interim rules since their publication, what I'm going to present are some general comments. We will later submit much more specific comments for the record during the comment period.

We have a number of general concerns. One of them is that although regulation includes a phase-in or transition period for a number of requirements, it's not clear to us that we're really going to be able to meet all of the requirements in time to keep the laboratories

functioning. And particularly since this will occur during the period when there will be significant new NIH funding available and new projects coming online, there is concern that, in fact, we will be able to achieve the necessary registration.

Particularly we're concerned about the legal requirement for clearance under the biopreparedness act and the regulations which involve the Department of Justice. We note that we don't think the Department of Justice is represented here today, which I think adds a bit to our angst about this.

The requirement for the security risk assessment, as specified in the regulations, does not give the specific information that we're going to have provide to the attorney general. It doesn't identify the process for the submission of information. There's really no specific timeline for action, other than the 1-month period during which we have to submit and clear initially for the entity and the responsible organizational

representative and subsequently for the individuals. Depending on how many individuals are involved in the specific information, this may be a significant problem in meeting the requirements of the regulations.

Another area of concern is that the regulations begin to proscribe certain experiments that we will not conduct. There are two listed in the CDC regs. There are more for comment in the Agriculture regulations. The two proscribed appear to come from the NIH guidelines, which in fact is a living document that changes. But by placing these within the confines of the regulations, we lock in on certain experiments that should not be conducted.

The fact that we've been asking Ag to increase that list to comment on further, again, is an area of concern. I think we would probably prefer to see the regulations reference the NIH guidelines or other such guidelines that are in fact subject to periodic review and simply say that we will comply with those guidelines, as opposed to

trying to repeat and proscribe experiments.

The toxin exclusion is interesting in that it is based on the PIs and we suspect, as was indicated this morning, that will mean that a fair number of institutions will not have to register as the quantities in an individual principal investigator control may be low.

With regard to the biosecurity arrangements, leaving it to the institution to develop their own security plan that is tailored for their own activities is in fact quite attractive. But not providing the guidance of who is going to actually judge the adequacy of those plans in fact can cause problems.

If an institution were to invest $100,000 in a security system only to find that that is not the system that someone on an inspection wishes to see, we will see in fact problems. I did not note a provision for preclearance of the adequacy of the security plan.

Further in that area, while each institution is free to develop their own plan,

there are certain provisions that are quite specific. For example, in the regulation, the proposal that all packages entering and leaving the area need to be inspected, while there's no requirement that we have a guard at the door, I'm not sure how one accomplishes the inspection of packages entering and exiting without some authority to in fact control the gateway to the area.

Certainly it implies that no researcher will enter a laboratory alone again. And given that these regulations apply to experiments that would be conducted in BL2 conditions, where in fact we may have avirulent strains or genetic elements within strains that themselves are not dangerous, that sort of requirement may not be what an institution would normally propose, given the flexibility, but may be required to incorporate, given the specificity of some of those, given--particularly in the Ag requirements.

In summary, I think we need to see a lot more detail. We hopefully will have a question-and-answer

period later today that will help clarify some of the issues. We'll be reviewing these very carefully. It seems like every line is requiring five to 10 reads to begin to understand the real implications. And I think a lot of us will be spending a great deal of time over the next days doing just that.

Thank you for the opportunity to comment.

MR. SPARKS: Emmett Barkley. Please identify yourself and organization, if you're representing one.

MR. BARKLEY: Thank you. I'm Emmett Barkely. I'm the director of the office of laboratory safety for the Howard Hughes Medical Institute, and I'm representing that organization.

I have four comments to make, but plan to submit detailed comments later.

My first comment is that the security and emergency response provisions are too stringent for select agents and toxins not mandated for control within maximum containment facilities. These provisions are based in part on a GAO report that

promotes threat and risk assessments in the planning of emergency responses to an actual domestic terrorist incident involving weapons of mass destruction and on OSHA regulations relating to hazardous waste sites. These primary sources of regulatory guidance have little relevance to the inadvertent release or theft of select agents and toxins from biomedical research laboratories.

The security and emergency response provisions may indeed fail to satisfy the law's requirement to be risk-based and to provide the appropriate availability of biological agents and toxins for research.

My second comment is that enhanced coordination between HHS and USDA could increase governmental efficiency and reduce regulatory burden in compliance and enforcement of select agent regulatory provisions. One registration and reporting mechanism and one office of compliance assistance and enforcement should be appropriate to meet the separate authorities of both agencies.

My third comment is that the interim

regulation clarifies the exclusions for toxins. We agree that it is appropriate to establish an aggregate amount for a specific toxin under the control of a principal investigator.

My last comment is that the performance-based regulatory approach used to develop the interim regulation for possession and use issues is appropriate and it will ensure worker safety and protection of the public health.

The final regulation should continue to reference existing HHS guidelines for the safe possession and use of pathogens and current OSHA regulations for the safe possession and use of toxins.

Thank you.

MR. SPARKS: Mike Durham. Again, please identify yourself and if you're representing an organization.

MR. DURHAM: My name is Michael Durham. I'm the director of occupational and environmental safety at Louisiana State University in Baton Rouge, Louisiana.

My comments, I'll try to keep within 2 minutes. If you would, hit the gavel when my 2 minutes is up, because I'm going to be reading some.

We feel that the new regulations issued go too far in too short a period of time. We recommend that the regulations be modified to reflect the actual gravity of the various agents and toxins and the likelihood of harm occurring from each. We feel that each should be covered by a performance-based standard of care similar to the BL levels currently in use in other research. We recommend, of course, that the timetable be adjusted so that we'll be able to achieve it. And we suggest that the government allocate some funds to help us cover the costs of these modifications.

At LSU, our vet-med facility helped a national effort against the anthrax. We typed the anthrax used in the attacks in D.C., New York and Florida. And so far our reward has been grief, expense and a large increase in administrative work.

We put in $130,000 worth of security equipment in our building and then found, under an inspection made, we were still lacking.

Recommendations go so far as to recommend bollards be placed in front of building, concrete obstructions to keep someone from going in with a vehicle and blowing the building up. And this is a veterinary school, a veterinary clinic. And it has both research laboratories and classrooms in it.

It's also a multistory building. I noticed that USDA made their estimates of costs based on single-story buildings.

We feel that in order to comply with the guidelines as set up, we'll probably have to build a standalone facility that can be set up with the necessary security.

One of our researchers commented that he felt that these new security measures were probably going to limit the number of locations and institutions where this research can be performed. This would immediately reduce the creativity and research and will impede the accumulation of

knowledge.

At LSU, for example, we map the world for anthrax. We sorted out what happens at the micro- and macro-scales. And a grad student even sought out how virulence can be measured or controlled. And with three lab experiments, we can predict the virulence without sacrificing any guinea pigs, which is fantastic on a number of dimensions.

We're also concerned that it's going to drive the research out of the country, where we don't have the information currency to get them to share it. And of course, we're also concerned about the cost.

So that is my comments, and thank you very much.

MR. SPARKS: Thank you for your comments.

I hope I pronounce this correctly. Mark Grushka. Is this correct, sir?

MR. GRUSHKA: Thank you. My name is Mark Grushka, and I'm the biosafety officer for the University of Arizona in Tucson, Arizona.

My comments today are directed to the

wording in part 73.9 relating to responsible official. I want to acknowledge to the CDC for recognizing the importance of a responsible official having the authority to ensure that the requirements of part 73 are met on behalf of the entity. In fact, recommendations are made in 73.9 that the responsible official be either biosafety officers or senior management officials or both.

I'm fortunate that as a biosafety officer for the University of Arizona I serve at the pleasure of the chief research officer, thereby vesting me with the necessary authority to facilitate compliance with such regulations. Unfortunately, many biosafety officers do not have the benefit of such a direct reporting relationship to a high-level management official and yet are often designated the responsible official.

I'd like to suggest to the agency that the language contained on page 22 of the recently released agricultural bioterrorism protection act of 2002 be examined for comparison purposes. It reads: We wish to emphasize that the entities'

responsibility to designate the appropriate individual to be the responsible official--i.e., an individual who has the authority and control to ensure compliance with the regulations. To satisfy the requirement, a university may chose to designate the dean of agriculture to be the responsible official rather than the biosafety officer because the dean of agriculture may have better oversight and authority to ensure compliance with the regulations.

This language recognizes the senior administrative official or manager may be in a more effective role to successfully implement both the letter and the spirit of the act. I do not want to imply that biosafety officers do a poor job of implementing such regulations in their respective institutions. In fact, oftentimes, despite their lack of authority, biosafety professionals do a very competent job of carrying out their critical functions to both private and public institutions.

My point is merely to suggest to the agency that by making the language more consistent

between the USDA and the HHS regulations, the dual goals of safety and security will be more fully achieved.

Thank you very much.

MR. SPARKS: Bob Hawley?

DR. HAWLEY: Thank you. Good morning, everyone. I'm Dr. Bob Hawley, and I'm representing the American Biological Safety Association, ABSA. I serve as a counselor for ABSA.

ABSA has reviewed title 42 Code of Federal Regulations, part 73, and understands and supports its intent. We will provide more detailed comments during the review period and will continue to offer our scientific, technical and educational services to legislators and those impacted by this interim rule. Further information will be posted at our Web site, which is located at www.absa.org.

I thank you very much for this opportunity to provide comment.

MR. SPARKS: Thank you.

That represents everyone who asked for an opportunity to make public comment. I would

suggest to those of you who took advantage of that opportunity that we in fact have a recorder here and we will make your comments a part of the record. If you would like to assure they're accurate and would give us a written copy of your comments, we will be happy to substitute that for what we are about to do.

Our next scheduled event after lunch is a question-and-answer period, which is scheduled for 1:30. Because several of the panel members are not scheduled to be here until 1:30, I really need to dismiss you and reconvene instead of trying to shorten up the time and maybe shorten up the meeting.

So this concludes the public comment period. The question-and-answer period will reconvene at 1:30.

[Break.]

MR. SPARKS: If we can take our seats, we'll get started. It's an age-old axiom that the sooner we start, the sooner we finish. We have a situation where the panel outweighs the audience

here.

[Laughter.]

MR. SPARKS: All right, we have, as you know, scheduled this afternoon a question-and-answer period. And we have assembled several folks who are working in the CDC Select Agent Program, working in the equivalent program in Agriculture, plus several folks here who were either chairs of the full committee or subchairs of the Interagency Working Group, who made technical recommendations to us as we put this reg together.

So now comes the accountability. They graciously agreed to be here to help answer questions.

Let's talk a little bit about this session. Our objective here it to help you understand the regulation. This is not a rewrite the reg session. If you've got concerns about the explanation you hear, if you have comments you want to make, speeches you want to make, please comment to the record. We want to make this a productive question-and-answer session.

And what I'm going to do, we manipulated around this morning, as most of you know, to have no light on the screen so that we could do some PowerPoint presentations, and now we're stuck with that lighting. I assure you that there are actually people up here. You can't just quite spot them.

[Laughter.]

MR. SPARKS: So I'm sorry about the lighting. What I'm going to do is start at the far end and come around the table here and ask folks to introduce themselves, describe what their normal position is in their agency, and describe the specific role they had in the Interagency Work Group or whatever, so you'll have a sense of the kind of folks that we've got here. We're one person short. She was here this morning, and when I spot her, we'll have her come on up on the stage.

So, Amy, can we start with you? You'll have to share microphones.

DR. PATTERSON: My name is Amy Patterson. I'm director of the office of biotechnology

activities within the office of the science policy within the office of the director at NIH. And my everyday duties are as director of the office of biotechnology activities, among other things, to provide staff and analytical support to the NIH recombinant DNA advisory committee.

With regard to the specific role in the select agent working group, I was on the group that addressed the genetic elements and the recombinant DNA portions of the regulation. In addition, our office coordinated and developed a cohesive NIH response to the rule, working with NAIAD and other applicable components of the agency.

MR. SPARKS: Thank you.

MR. MITZEL: I'm John Mitzel. I'm the section leader for facility inspections for the USDA Center for Veterinary Biologics. I was one of the co-chairs for attenuated strains and exemptions.

MR. SPARKS: Ira is not here, so Charles?

MR. MILLARD: I'm Charles Millard. I'm the chief of the division of toxins and aerobiology

at USAMRIID, Fort Detrick. And my role on this committee was to chair the subcommittee that looked at toxins.

MR. SPARKS: Okay, we've met Denise Spencer earlier today. Do you want to describe your real job?

DR. SPENCE: Okay. I'm with the Veterinary Services in APHIS, and I'm involved with the implementation of the reg for USDA. And I was on the subcommittee for exemptions.

MR. SPARKS: Beth Buckler.

MS. BUCKLER: I'm Beth Buckler. I'm a senior regulatory analyst with USDA APHIS, and I wrote the rule for USDA.

MR. SPARKS: Kevin we met earlier.

MR. SHEA: Kevin Shea, director of policy and program development for APHIS. Our staff actually writes rules. Beth is the actual writer of the rule. And in addition, in the audience with us, who may be able to help, is Shannon, who organized the rule on the behalf of APHIS.

MR. SPARKS: Okay, thanks, Kevin.

Stephen?

DR. MORSE: I'm Stephen Morse. I'm the associate director for science for the bioterrorist preparedness and response program at the CDC. And I co-chaired the Interagency Working Group and I was also the chair of the exemptions subcommittee.

MR. SPARKS: James?

MR. HOLT: I'm James Holt. I'm an attorney with the office of general counsel for the Health and Human Services.

DR. ELLIS: Barbara Ellis. I'm a senior microbiologist with the Select Agent Program.

MR. HEMPHILL: She's also chief of operations. I'm Mark Hemphill. I'm chief of policy for the Select Agent Program and was involved in the work groups as well as the development of the reg for CDC.

DR. OSTROFF: And I'm Steve Ostroff, the deputy director of the National Center for Infectious Diseases at CDC. And I guess my role is usually to testify before Congress when they have questions about the rule.

MR. SPARKS: Okay, thank you.

We've got a couple more panel members that we're expecting to join us. We'll try to get them introduced when the come in.

I thought I would begin the question-and-answer period by answering a question. It has come up in testimony and in statements and in hallway conversations earlier about the role the Department of Justice. I don't want to present myself as a representative of the Department of Justice, but we have been in very constant communication with them--we meaning ourselves and Agriculture--and are currently working on a memorandum of understanding between the three departments to set up how the security risk assessment might work.

Let me just describe for you--and this will be my understanding now, coming out of those meetings--the kind of approach that I think the Department of Justice would like to take. They're getting ready to put out a multimillion dollar contract to develop a database for this activity. What they envision is a Web-based system whereby an

entity, through its responsible official--the ROs and the individual employees--can go in and fill out a questionnaire online and then take that data--and as you know, the legislation calls for a background data check, and run the names through several different databases that they have available to them.

If in fact there is no hit--in other words, a name passes through there and there's no issues raised--this is a matter of a very few days from the time that the individual goes into the system and it comes out the other end, having gone through the database check.

We anticipate at this time--and remember, I'm not speaking for Justice here, but I think it is their intention, in terms of their current planning, to require fingerprints. And they're working out ways to do that now. There are electronic ways to do fingerprints. The other possibility is to go to a local law enforcement or other department--for instance, on a campus it may be that the campus police department, if they're

approved by the FBI for fingerprinting. And they will have to go there.

So the important issues to be worked out is, if you read the legislation closely, you will note that not just anybody can go in there and say they want to get this clearance. In fact, the facility, the RO, has to certify that this is someone who needs access to select agents. So the responsible official or an alternate responsible official will have to go into that same Web-based system and using identification numbers and so forth--I won't go into all the detail at this point--but a number that we in fact will give them, then go through and certify that the person in fact requires access to the agent.

Again, now following the legislation, the Department of Justice will then make a recommendation to us, to the secretary of HHS or Agriculture. That recommendation, that will take the form of they're recommended of they're not recommended to have access to a select agent. The final determination is with the respective

secretaries of the two departments.

Frankly speaking, I can't imagine the circumstances under which a secretary of HHS, for instance, would grant access to a select agent if the Department of Justice has not recommended it. But in fact, the way the legislation is set up, the final determination is with the respective program, if you will, secretaries.

So as you can see, there is a lot of complexity here. There's a whole new database, Web-based database system that has been to be developed and the entities are going to need to have access so that they can certify, and we're going to have to have access to it so that we know what the status is, as well as for application purposes.

If in fact a person is recommended for approval, it is our respective department's responsibility to so inform the entity, not Justice, but it's our responsibility to inform you. If in fact they are recommended for denial, then it's our responsibility to inform the entity and

the individual, and the individual has a right to have that decision reviewed.

So this is a complex thing. It involves three-department cooperation, which is difficult in and of itself, and then it also of course involves the various entities and the individuals who are seeking to work with these agents.

You will note that when I went through the timeframe earlier today, we tried to distinguish during the transition period between a facility having to have applied and having been cleared, so we tried to give a timeframe in there that we anticipated might be a reasonable timeframe for a facility to get back the information that their employees are cleared.

One thing that we would appreciate comment on, comment to the record, is that anytime you're in the business of developing a new data system, there can be delays in that, although they are basing this on a currently operating system for another purpose, so it's not going to be starting from ground zero. And clearly we don't want to

make you--I'm pointing to the audience--we don't want to make the people running these facilities responsible for getting a clearance for their employees that can't be done. You can't put that onus back on the entities.

So our backup position here is that we would publish in the Federal Register a delay of the effective date for those background risk assessments if in fact the Department of Justice has not given us a green light that they're ready to go and process them.

Every conversation that we have had with them is, if and when their system is up and operating the way they want, we don't anticipate major delays. But until it's up and operating and we live with it a little bit, we don't know.

So this is back to the issue we talked about earlier, the balance of maintaining our ongoing activities, which are very important, and implementing security on the other side of this, because security has two parts. It's the physical security of the building and that, and it's also

the clearance of the individuals. And frankly, I think most of the security people tell me the clearing of the individuals is the heart of a security system.

So we would appreciate your comment to the record about your concerns about this in general and specifically your feelings about whether this is a reasonable backup approach.

But what we would do is come back into the Federal Register and announce to you that in fact this or that section of the regulation would be-- implementation of it or the applicability date is the technical term, I believe, would be delayed 60 days or whatever appropriate time it would take to be operational.

So, again, I'm just trying to describe for you our understanding of what the Department of Justice is wrestling with, the direction that we believe they're trying to go. But if in fact it called for a delay, that's our rule, that would be our action to take. And we would solicit your comment on that, even though it doesn't say that

specifically in the preamble, we still would appreciate public comment on that.

I'd be happy to take questions, but I'm probably just about at the outer limits of my knowledge on this subject, since I'm not the Department of Justice.

Yes, sir?

I would ask that each of you, as we get into this question-and-answer period to come to one of these two microphones and identify yourself so that we get your question recorded properly.

DR. HAWLEY: Yes, I'm Bob Hawley from Fort Detrick, USAMRIID.

The question I have is, what about the individuals who currently hold a top-secret or a secret clearance, first? And then secondly, what about the other individuals in the institute who are currently undergoing national agency checks? How will that marry up with what the Department of Agriculture wants, or HHS, regarding security assessment? Will that be a duplication of effort?

MR. SPARKS: It could be, obviously. But

the Department of Justice, acting under the legislation, will require an individual, regardless of whatever other clearances or whatever they might have, to go through this system.

Now, in fact, if they're already cleared, it's going to be probably a matter of hours before they turn that around. It's their requirement. They're going to request the information on the individuals that they feel they need in order to make the recommendation to us that the individual have access or not have access to select agents. We're not setting their criteria for them.

One minor thing. You'll note that the entity, if it's a federal agency, doesn't have to be cleared, obviously. That's the only exception made in the legislation.

If you'd just hold one second, Dr. Patterson is going to have leave early, so I alert you to that, so that if you have questions that deal with the recombinant DNA or that portion of the regulation or some important questions we ask for comment on in the preamble, I would suggest you

get those questions in early.

Okay, yes, sir?

MR. OBRIOT: I'm Ken Obriot from Wyeth Laboratories.

The question comes up with foreign scientists doing work in this country, how extensive their backgrounds would be? Would you be doing investigation back in their home country?

MR. SPARKS: Well, I'm setting myself up here to be the Department of Justice spokesperson. The best I can tell you is that the databases that they're going to be using would also take into account the residency of the individual. I think that's probably I could and should say about that.

How they handle it may differ, but it doesn't matter whether it's a U.S. citizen or not, they have to go through the process. And what Justice does is--I don't know all the databases they're going to check and, frankly, I don't think I should know.

MR. ATLAS: Ron Atlas, American Society for Microbiology.

Staying with the clearance question and asking you, perhaps, or others to be the Department of Justice, if someone is cleared at one entity but now visits another entity to do work, do we need to do a second clearance? It's not clear from the regs how we do that or whether we have to treat that person as a visitor to that entity to be escorted, assuming that the other entity is in fact registered.

I can picture in this area that there will be a fair number of exchanges among laboratories working on similar areas, where the individuals who have been cleared, let's say USAMRIID or CDC, and then they go to a laboratory perhaps at Harvard or elsewhere. It's absolutely unclear to me whether then the other institution has to do a second clearance.

If someone could clarify what the regs are?

MR. SPARKS: I could make an attempt at that, but I don't know everything that you--I can't answer it fully. I'm sorry.

Part of the clearance, I mentioned earlier, is in fact the entity itself certifying that that individual needs access. So if you in fact are cleared, if you will, to work at the University of X and then you're going to go over across town at the University of Y, Y is going to have to come in and say you need access in our lab. So that in fact what you're not going to walk away is a license to work with select agents wherever you want to go. You're going to have to be connected to a facility and that facility is going to have to certify that in fact you need access.

Now, the other thing that you could take into consideration is they can be a visitor at another facility and we've suggested how people might approach that in appendix F and other places and how they might treat visitors. So it would be a judgment of the facility itself. If it's a short-term thing, they might just simply not bother with a new clearance but treat the person the way a visitor would be treated in your facility. If it's longer term or semi-permanent or something like

that, you may chose then to come back and get a full second check.

But the second check I would think would be pretty rapid, since they had cleared through the process before. And that's guessing.

And if anybody else wants to be a Department of Justice employee, step right up.

[Laughter.]

MR. SPARKS: We'll pay you, too. Yes, sir?

MR. BIENSTOCK: Robert Bienstock, University of New Mexico.

Federal and state agencies don't have to get a facility security clearance, as I understand it.

MR. SPARKS: That's correct.

MR. BIENSTOCK: The state agencies, is that intended to include state universities or is that a matter of state law?

MR. SPARKS: I think that's a matter of state law, isn't it, Mark? Yes.

MS. SHOEMAKER: Janet Shoemaker with the

American Society for Microbiology.

I have two questions about the clearances, and then I have another question about the exemption for clinical laboratory reporting.

I note in the regulations that the alternate responsible facility officer, that there's no required security risk assessment required for that individual specifically.

MR. SPARKS: We intend for them to do that.

MS. SHOEMAKER: You might want to look at that.

MR. SPARKS: It may not be as clear as it should be, but it is our intention that they would have. The question was whether the alternate RO would have to undergo the same clearance process as an RO, and our intention is that, yes, they would.

MS. SHOEMAKER: That's not stated, actually.

MR. SPARKS: And she's pointing out it may not be as clear in the reg as it should be.

MS. SHOEMAKER: In the case of the entity

receiving a clearance, how will that work? If it's the American Society for Microbiology being cleared, who is cleared?

MR. SPARKS: Now you're really taking me down the Department of Justice path. As we understand it, there will be in this Web-based system a separate part of an application for an entity, and information about that entity will have to be provided.

So if it is in fact a private corporation, they will want to know about that. They may in fact check on who the owner is. They may check in fact on who the board of directors is. That kind of thing that you would have to check an entity as opposed to a person. And, again, it will be a Department of Justice requirement as to what information has to be provided.

MS. SHOEMAKER: My third question is about the reporting requirements for clinical diagnostic laboratories. In section 73.62, I noted that in the implementation of the regulation, you're requiring that diagnostic laboratories report only

certain high-risk select agents and toxins and not all the select agents and toxins, which I believe is really what is in the provision in the legislation.

MR. SPARKS: Yes, I think I'll ask Mark to address that.

MR. HEMPHILL: Sure. We actually do or at least the intent here is requirement for reporting of all, but it's a written requirement. We felt that the agents that were identified in 1999 in the categorization of agents for public health preparedness and response initiatives, the category A, B and C list--what's represented there is the category A list, those of highest threat concern. And we felt that those needed an immediate notification for that.

But all agents actually require a written notification.

MS. SHOEMAKER: I don't think that's clear in the regulation.

MR. HEMPHILL: Okay. That certainly is our intent, though, and we'll look at that, to make

it clearer.

MS. SHOEMAKER: And then my last question is about 73.10 safety, where there is a D, a reserved section for experiments that warrant additional scrutiny in the interest of safety.

And going through the legislation, I don't see where the authority is for this section. Could somebody comment on that? There's no express provision for prohibited experiments in the legislation.

MR. SPARKS: Dr. Patterson, do you want to talk about our concerns there?

DR. PATTERSON: Well, those concerns transcend simply recombinant experiments. I think that section is aimed at, without making the rule as it stands overly proscriptive and trying to envision every possible experiment that might result in an organism that meets the criteria that were used in selecting organisms and placing them on this list, but rather as data emerges, to have some mechanism by which such experiments could be reviewed, but without having to make the rule as it

stands overly proscriptive by trying to imagine what those experiments might be. I think that's the intent of this section.

Mark, do you want to add?

MR. HEMPHILL: No, I'd just add that under our current reg, we actually have a prohibition, and so we've actually then terminated that prohibition, but couched it in requiring federal oversight of certain types of experiments that are listed in the reg that are corollaries to what's in the NIH guidelines and then are seeking comments on if there are other types of experiments that are of a nature--and we've given some suggestions of increased virulence or changes in host range, various things of that nature that perhaps should also require some sort of federal review before those experiments take place, to make sure that the appropriate safety and security conditions are in fact met, just because of the sensitive nature of the type of experiments being conducted.

MR. SPARKS: We have two panelists who have just joined us.

MR. BERKOWER: Yes, Ira Berkower from the FDA.

I think that, if I have the section correct, 73.10, there are certain experiments that are proscribed without prior approval. And I think it's very important what these experiments are. One of them would be deliberate transfer of drug resistance.

The only question we really had about this was where to put this, but in fact this is something we think is very important that should be reviewed and social be proscribed unless specifically allowed.

And similarly, the part in section 2 is also a very, very serious and important provision, which I think we can defend very strongly as coming under the intent of the law.

MR. SPARKS: Ira, would you also describe for them your role in the Interagency Work Group?

MR. BERKOWER: Yes. I'm involved with exemptions, particularly in defining when a product that's exempt under one of the four provisions for

exemptions. Two of the provisions involve either investigational drugs or drugs that are registered, licensed or approved by a federal agency. And I was trying to clarify those.

MR. SPARKS: And the other person who has joined us here, Rachel.

Do you want to just say who you are, what your real job is and what your role was in terms of the Interagency Work Group?

MS. LEVINSON: My life before. I'm Rachel Levinson. I'm the assistant director for life sciences at the office of science and technology policy. I worked with an interagency group on recommendations for what became 73.11 on the security plan.

Most of those recommendations in their totality became part of appendix F of the BMBL, which was published on December 6th in the MMWR by CDC.

MR. SPARKS: Okay, thank you.

More questions?

MS. MICKELSON: Hello, I'm Claudia

Mickelson from MIT. I actually had four questions, but I'd like to go through them--I know Dr. Patterson has to leave quite quickly.

But I'd like to thank you all. I think actually this is really wonderful that you all took the time to come and try to talk to all of us to explain this regulation. And I think you've all worked very hard, and we appreciate it. I think we can see the development of the regulations over time and that we can see a lot of thought went into it, and you tried to make at least the scientific part of it as reasonable as possible. And I think you should be applauded for that. I've never seen anything move on such a short timeline.

My unfortunately four questions are--I would like to know if there's any effort by NIH or anyone to try to help investigators bear the burden of the costs of compliance. In order to comply with some of the security issues that are discussed in the new appendix, and in the revised BMBL, it could be a significant cost to investigators to renovate and adapt their labs. I'm not sure

institutions will step up to the mark, but somebody is going to have to be looking at financing that. And investigators, in that sense, will have to know clearly what's expected of them.

I also would like to ask and hope that there would be some effort to publish the criteria that was used to include or exclude certain strains. I think some of us are wondering why things like herpes B was put in. It would also help us to make assessments in the future as new things come and new things arise, our investigators propose research, if we understood the criteria used. I think some of that was done for the various categories, A, B and C, but some of other things it might be better. The more information we have in hand, the easier it will be for all of us to work together to comply.

Thirdly, I would like to plead for the accuracy of the databases. I know that these will be very large databases. They're already very large databases for the EA-101 transfers. It's important that that information be accurate. I

would not attest to its accuracy at the moment.

I do think it's important that, in particular, in the background checks that are done, that the Justice Department make every effort to make sure that their databases are accurate and that EA-101 transfer any database that is used in this regulation be somehow--quality-control and quality-assurance be built into it.

I note the lack of a Department of Justice individual here on the panel. I think it's a shame, because many of us have a great deal of concern about the background checks, about the timing and frequency and what were to do in the interim if there is a problem.

I know you've addressed it, that you have a backup plan in place. But I think many of the issues that are raised by these background checks are things that, as an academic institution with undergraduates, graduate students who come from many different countries, these are issues that we would like to see some assurance on.

And fourthly, and last but not least, I

have one question for Dr. Patterson. I appreciate the changes in the definitions, and in particular some clarifications that you attempted for the nucleic acid section. However, I think that maybe some of the intent that you had for using the words, instead of full-length clones or CDNAs, that were infectious, fully infectious or replication competent, I think that possibly you need to possibly include a little more, because there are many ways to reach that end that do not include using all of the genome of a, say, a virus. And if you leave that definition in place, then many times some of the even gene transfer vectors could be included in that. I think maybe a little more thought to actually--I understand what you're trying to get at, and it's certainly better than associated with a disease, but is there some way that maybe we could and people who will be commenting on this, but I'd like to hear your thoughts on that, if you wouldn't mind. Thank you.

DR. PATTERSON: Well, I think you hit on the head the goal that we were trying to achieve by

changing this language. But I think we'd also very much welcome written comments with suggested language, how you think it would be clearer to communicate this point.

And I think on the point that you addressed with regard to efforts at NIH to bear cost for some of these initiatives, I think that this is a point of deep thought and consideration at the agency, not within my office, but across the institutes and centers that are involved in this research. So I thank you for your point.

MR. SPARKS: I'll try to remember all the elements of your question.

Let me first say on costs that the CDC bioterrorism preparedness grants that go out to state health departments, there's a section that provides them funds to upgrade their state laboratories, and so in fact there is some funding for that.

MS. MICKELSON: I'm talking about academic--

MR. SPARKS: I know. I had one good thing

to report. Let me give you that one.

And then I think I will just open it up to the panel in general, to see if there are any other comments about cost. But I'll tell you frankly, while they're thinking about that, I don't know of anything specific, unless NIH research grants allow for something. But I'm sure it would be specifically related to the research project itself and probably the same in Agriculture.

So is anyone here anxious to step in and give any comment on this?

Rachel?

MS. LEVINSON: I'm going to respond to that with a question to all of you, that as you look over the details of the requirements of compliance and consult with experts in your institution in trying to determine what it will cost you to come into compliance, that would be useful information for us to feedback in helping with the budget proposals.

MR. SPARKS: Okay, thank you.

In terms of criteria, I might ask Dr.

Stephen Morse to talk a little bit, if I understood the question, since he chaired the committee that created the list. That committee also reviewed all of the comments that we got when we published the list and made the revisions that you saw in the interim Final Rule.

Do you want to talk a little bit about that?

DR. MORSE: Okay, let me first address the herpes--which was a monkey B virus, which was one that you raised.

We had virological expertise on the subcommittee, and we relied heavily on their comments concerning specific viruses. If I remember right, the comments concerning monkey B virus was that, first of all, it causes fatal human infections. It's a biosafety level 4 agent. It can be grown to fairly high tiders. And it can be disseminated as an aerosol.

And with that, people felt that it should be on the list. So that was the reasoning behind that.

Bob, do you have any specific comments? I know that it was Peter Jahrling who was really pushing--

DR. HAWLEY: No, I agree. The only situation was it can actually affect--

DR. MORSE: Right, are excluded.

So it's only the virus itself, people working with the virus.

With respect to the other agents, there were a series of criteria that were developed. If I remember right, it had to do with infectious dose, treatment, whether the infection was transmissible or not, public health impact. There was a number of other criteria that were used to rate the various agents.

And everything was ranked and we decided which agents would be on the list by taking a vote of all 21-plus federal agencies that were on the panel. Any dissensions were fully discussed and we reached a consensus about which agents should be on the list.

MR. SPARKS: In terms of accuracy of the

database, we too, the CDC, are in the process of letting a contract. And we're going to be creating a whole new database for this activity.

As far as the Department of Justice, all I can say is I'll pass that along.

MS. MICHELSON: I want to thank you for your time. I appreciate your answers, and we do appreciate the time that this all took.

It's merely in terms of the criteria question, it will help us in the future. As people come up with new ideas and new things, it will help us make better decisions as to whether we need to talk to you all or whether we can deal with it on our own.

Thank you.

MR. SPARKS: Sometimes when we're asking a question we're also, of course, naturally, making a statement and offering an opinion. And I encourage you to take those statements or take those opinions that you do have and in fact formally submit them as comments to the record, so that we can have that. We're not going to engage with you in a

debate about opinions, but we want to hear the opinion, and we'd encourage you to send it to the record so that we can have that to look at.

Yes, sir?

MR. PARENTI: Hi, I have two questions. My name is Mark Parenti. I'm with the office of general counsel of the Texas A&M University system.

My first question is, does the United States Department of Agriculture intend to publish a list of exempted attenuated strains? This will be useful for our agencies, veterinary diagnostic labs, because my understanding is there are commonly used strains. And if a list could be published, that would be very useful. That's my first question.

MR. SPARKS: So I'll turn to the Agriculture contingent.

And I think maybe for other questioners, if you've got multiple parts, could I ask you to just ask them one at a time, as this gentleman is doing? That way we're sure not to skip over or gloss over question number three or something like

that. So we'll have a little format change here.

Okay, Agriculture, I gave you time to think about it.

MS. BUCKLER: Okay, I think I was recruited for this one. The regs state that we ask that you apply for the exclusion. We will publish a notice in the Federal Register, but we were pretty clear about the fact that it would be linked to a particular strain and a particular activity. It's not going to be just across-the-board. So you'd still need to apply for the exclusion.

MR. PARENTI: Okay. My second question is, my institution has both agricultural research and human disease research, and they're oftentimes conducted at the same facilities. And we're trying to figure out what kind of a person to appoint for our RO. In that situation, should it be the dean of agriculture or a biosafety officer? And I address that to both the CDC and the USDA representatives.

MR. SPARKS: I suspect that our panel doesn't want to answer that question.

[Laughter.]

MR. SPARKS: And the reason is, we provided in the regulation the flexibility for you to make that determination. And we debated a long time among ourselves about being more specific, for instance, requiring that it be a certain type of individual. And we decided not to do that, and the reason is that you're in a large university system, but these regulations cover some very small operations out there, literally mom and pop. And so to then put in a requirement that it has to be a biosafety officer when they simply don't have that particular set of credentials, or any other, we felt would be over-regulating, if you will, if that's an appropriate term, these small entities out there.

So we kept it broad on purpose. And I doubt if anybody here now wants to come back and give you specific recommendations. But I'll give them a chance, if somebody wants to do that.

It's your decision, I think is the answer.

MR. PARENTI: We're just looking for

guidance.

MR. SPARKS: Either decision is acceptable, I think.

MR. BIENSTOCK: Robert Beinstock again, from the University of New Mexico.

I've got about four or five questions. I hope you'll bear with me.

MR. SPARKS: I will if you ask them one at a time.

MR. BIENSTOCK: One at a time. That sounds fine.

The first is on registration information, the registrations for facilities that are currently registered that have to be submitted on March 12th. And the application requires information about safety, emergency and security plans, et cetera.

As to the security plan, the security plans aren't due until June 12th, so what is being sought on March 12th to describe that security plan?

MR. SPARKS: If I remember correctly, you have to have applied for the security risk

assessment for the entity and for the RO and you certify that you have done that.

MR. BIENSTOCK: And that's on March 12th?

MR. SPARKS: Yes.

MR. BIENSTOCK: So that's all that's being sought?

MR. SPARKS: Right.

MR. BIENSTOCK: It's just the application, not a description of the security plan that presumably--

MR. SPARKS: The security plan--I'm doing this from memory now, without my slide--but I believe that's June. Am I correct?

MR. BIENSTOCK: Correct. June 12th--

MR. SPARKS: You have to have your security plan completed by June and implemented by September. That's part of the phase-in. We know that most of the entities are well-prepared to deal with a safety plan. Ninety percent already have a safety plan. A very high percentage already are in compliance with the BMBL and so forth. So we expect that that can be done and done early in most

facilities.

But a security plan may or may not be in place for many of these facilities.

And I should also point out, if you look closely in there, if you already have a plan that the institution has prepared for another purpose--an OSHA reg or other kinds of things, and we point out some examples in there--you can use that. You don't have to create a whole new one, as long as you add the specificity needed, just add on what's needed for that, that particular operation. So you don't have a whole separate, freestanding--same thing with an emergency response plan. If your institution already has one in place, it just needs the specificity for this particular agent in this particular place added to it.

MR. BIENSTOCK: So for the March 12th application, on the security plan portion, you can just say that is under development and will be ready on June 12th.

Also, on the application for registration, the information about the select agent's name,

source and characterization information, can you give some guidance as to what is being sought under characterization information?

MR. SPARKS: I would turn to Barbara or Denise?

MS. ELLIS: Actually, to both of us.

First and foremost, strain designation, if it's available, if genetic information has been published, for instance, sequence information in GenBank or something like that, then GenBank accession numbers or any other additional data with respect to genetic characterization of the agents that has been published in peer-review journals.

DR. SPENCER: That information is being collected for the Department of Justice to help them if there's an investigation. So any kind of information that would help them to be able to identify specifically that agent, that would go in that area as well.

MR. SPARKS: Okay, another question?

MR. BIENSTOCK: With regard to transfers that will now require prior CDC approval, can you

give us a sense of what the turnaround time will be, to help us with planning?

MR. HEMPHILL: Well, obviously this will be a learning curve for everybody involved. But we've already increased staffing to address the influx that we're anticipating for this. We also have contractors onboard that have the appropriate security clearances to assist us in this process.

It is our hope that we will evolve eventually to a Web-based system, but obviously associated with this are security concerns, so initially it will maintain a paper base as we currently have it. And we're developing the resources to deal with that initial phase before we get to an electronic submission form.

MR. BIENSTOCK: And I'm asking this not as a comment but really as a question. Should we be thinking 1 week? Should we be thinking 1 month? I mean, what order of magnitude are we--

MR. HEMPHILL: No, no. We're considering days here for this.

MR. BIENSTOCK: Thank you.

And then finally questions about changes in the registration. I had some questions in the regs.

First, the regs seem to require notification of certain changes in the registration application. The preamble talks about prior approval with regard to changes. So that was unclear to me, whether certain changes must get prior approval and other changes merely require notification.

MR. SPARKS: Was that in the CDC reg?

MR. BIENSTOCK: In the CDC reg, yes.

MR. SPARKS: Mark?

MR. HEMPHILL: Any change to the application that's submitted--for instance, a change in location where an agent will be worked on--changes actually then the information we have to ensure that that location meets the requirements. So that's why we're asking then for that information to be submitted. So it's really any change that occurs to the information that we're asking on that application, that we need an

update of that so that we can assure that it meets the requirements.

MR. BIENSTOCK: And then one final question, if I may.

MR. HEMPHILL: I'm sorry. To make it clear, then, yes, it does require pre-approval, then, for that. And we'll send back, then, that, yes, we've updated your application based on the information submitted.

MR. BIENSTOCK: And then one final question. In the list of examples of things for which we need to notify you if there are changes was included protocols and objectives of the study. And yet I didn't see that protocols and objectives were listed as being required for the application itself. So I found that a bit confusing.

MS. ELLIS: Actually, we do request a very brief statement with respect--specific protocols we don't particularly want. But we have to have a feeling for objectives of the study in order to ascertain things such as if the biosafety level for the particular agent is appropriate. So we do

request a very brief statement in the new application, as we do in our current application under part 72.

MR. BIENSTOCK: Thank you.
MR. SPARKS: Yes, sir?

MR. CANTONE: Frank Cantone, Cornell University.

I have several questions. Probably the first couple can be answered pretty easily.
Is there any distinction made with subunits of various toxins? For example, botulinum toxin with a light chain and heavy chain?

MR. MILLARD: We intentionally were interested in capturing the toxin in its active forms. So inactive components of toxins are not themselves toxins.

MR. CANTONE: Okay. Currently we have a facility that is registered, but they only work with the light chain of botulinum toxins, so they would eventually drop out; is that what you're saying?

MR. MILLARD: Under the regulation of

toxins, yes. Now, there are provisions in the regulation for manipulation of genetic elements, probably somebody else should speak to that. But those certainly would drop out in terms of toxins. They wouldn't be regulated as toxins.

MR. CANTONE: Okay. Next question, you talked about inactivated, nonviable agents or toxins. Are you requiring documentation as to how that was completed?

MR. MILLARD: No, because they're excluded from the list.

MR. CANTONE: Okay, but who defines whether they're inactivated or nonviable? That's what I'm asking. Who makes that definition?

MR. MILLARD: You do.

MR. CANTONE: Okay, fair enough.

And the big question, if the panel could address what is considered access and who is considered access to agents' areas, actual agents themselves?

We had some lunchtime discussion about, for example, custodians who come into the

laboratory to empty the waste containers. Are they considered having access to the select agent that might be locked up in a freezer, for example?

MR. HEMPHILL: To start off with, we've added in our regulation some provisions of guidance for that, where if, for instance--and I believe this is also in the MMWR published on December 6th. But certainly in our reg, we provided guidance where if there is somebody who is authorized, has received the DOJ clearance and is there to monitor the custodial staff or visitor to that area, as long as they're constantly monitored by somebody who has already been approved, we're giving guidance then that that janitorial staff or temporary person in there does not have to have a clearance.

But if they have access to that area and do not have somebody monitoring or supervising them that already has a clearance, then they would have to obviously have their background check through DOJ before they're really allowed access to that area.

MS. LEVINSON: I think that really says it. It gives you the leeway to determine what is appropriate for your facility. If you don't want to have a monitor present, or if they're going to be there at a time when a monitor can't be present, then you should go ahead and get them cleared. But it really is up to your discretion as to how you want to handle that.

I think it's still, if in it's in that facility, within the containment facility, it depends on what kind of provisions you have for locking it away, if you determine that that's sufficient. But I think still, if it's within the containment facility, and you have someone there that's unmonitored, that you'd want to be very clear that--when you say locking away is truly locked away.

But I think someone who has done a site visit for that specific question should really answer that.

MS. POULAKIDAS: I'm Jennifer Poulakidas with the University of California. I've got a

couple of questions for the panel.

One question is, would you be able to provide us with any specific clarity on the timing of these background checks? Can we be assured that the background checks won't take longer than 30 days, for instance?

MR. SPARKS: Well, in my newfound capacity in the Department of Justice--

[Laughter.]

MR. SPARKS: I stepped into this. I don't know why.

Based on conversations with them, every person goes through what they describe as a no-hit. It should be just a matter of days. Now, if there is a hit, if something comes up in that data check, then all bets are off. Then they're going to have to go and do more investigation to find out why in fact something came up to the radar screen.

And we don't know. We haven't had experience with it yet, what percentage. I mean, that would be the next question if I was standing there. I'd ask, Well, how many of that is it going

to be?

I don't know whether that's 1 percent or 5 percent or what percentage it might be. But there in fact will be people who are recommended to have access, people who are recommended to not have access, and there will be some pending. We are hoping that that's a very small number. And if they're in fact denied, then they have the right to have that reviewed.

MS. POULAKIDAS: So that's my second question. Could you walk through that review process?

MR. SPARKS: Yes, I think so. James, I'm probably going to rely on you, since he's the attorney with the program and in fact will be responsible for that process.

MR. HOLT: If the recommendation comes back to deny, and the secretary in fact denies, two letters will go out. One will go out to the entity, advising the entity that person has not been granted access to the agent, access was requested, and that's all. The second letter will

go out to the individual who requested access, and that will explain in general terms why access has been denied.

That person then has a right to submit to the secretary who denied them access a request for review, and any documentation or information that they believe can correct, if they believe a mistake has been made or any matters of mitigation, if that would be appropriate. "I was convicted of a felony, but it was 30 years ago and it was stealing a car," that sort of thing.

The secretary will then forward that to the Department of Justice and ask them to consider the information provided. And then the department will come back with a recommendation based on that submission, either staying the same or changing it. And then the secretary will have to make his or her decision based on the information submitted and the Department of Justice review.

At that point, the notice will then go back to the individual who asked for a review, either denied or now accepted. Once that has

happened, that's final agency action.

MS. POULAKIDAS: So, just to clarify, Mr. Holt, it sounds like someone can appeal an original denial based on either mistaken identity or mitigating circumstances.

MR. HOLT: Yes.

MS. POULAKIDAS: Okay, so both those criteria.

MR. HOLT: For any reason they think is appropriate. You've got the wrong person, being a member of the Red Cross shouldn't disqualify me, for whatever reason.

MS. POULAKIDAS: And do we have any sense of that timing, the appeals or review process timing?

MR. HOLT: No, not yet.

MS. POULAKIDAS: Okay.

MR. SPARKS: We have virtually no experience with it.

MS. POULAKIDAS: Right.

MR. SPARKS: And I think it's safe to say--I'm looking over at Beth--that it really won't

matter whether it's a U.S. Department of Agriculture or a U.S. Health and Human Services denial. The process is virtually the same, and it's going to go back to Justice and ask them to re-review and take this information into consideration, as James described it. So it should be virtually the same process, regardless of which secretary denied access.

MS. POULAKIDAS: And to go back to your original answer for how long this would take in the first place, you said as long as there are no hits, this is information from Department of Justice, as long as there are no hits, it would only be a matter of days. Can we estimate that to be less than a week?

MR. SPARKS: Sure, if you want.

[Laughter.]

MR. SPARKS: We think that--what we're in the process of doing right now, frankly, is negotiating an MOU with the Department of Justice, and we're going to ask them to commit to us a timeframe.

MS. POULAKIDAS: Great.

MR. SPARKS: We're going to ask for the shortest timeframe we can. They're going to ask for the longest they can. And we'll negotiate that.

I think one thing you should keep in mind, our current estimate--and I'm not going to swear by this number, but it's our best estimate--is 20,000 employees in these entities. And I think you can all think about your own facilities and so forth. That number is going to turn over. This is not as though it's 20,000 people on March 1st and on whatever date in September we have them all or virtually all cleared. No. There's going to be students and others coming and going. It's going to be a churning process, a continuous process. And I think until we've lived through a year of that, going anything beyond what I've already told you is pure conjecture. I'm not sure what I've told you is not a certain amount of conjecture.

But, I mean, those are the numbers. If in fact it turns out to be 20,000 different

individuals--thank goodness it is a data check; it's not like a field investigation of all those people and that sort of stuff.

But until we experience that and see what in fact the hit rate is and how long it takes to process that, it's going to be difficult to give you estimates. And the fact that there are so many questions and people are apprehensive about it, it's all new. None of us have dealt with this before, at least not in this context.

In private sector when we've asked the question of many of the commercial facilities, they already have extensive checks and things that they do on new employees, and so they're more attuned to it. And maybe in the government laboratories and so forth, we're more attuned to it. But I think for a lot of academic and other institutions, it's going to be relatively new.

MS. POULAKIDAS: Thanks. I have one last question. Do you all plan to elaborate on guidance to institutions as they come up with their security plans, to give the institutions a little bit more

of an idea of how these security plans should be laid out?

MR. SPARKS: I think right now the appendix F represents the best guidance that I would anticipate having in the near future.

I'll just look to the panel, if somebody has some plans that they want to talk about.

MR. SHEA: I think the rule also calls for us to provide technical assistance as we are developing the plan.

MS. POULAKIDAS: Great. Thank you.

MR. SPARKS: Okay, other questions?

MR. OBRIOT: Ken Obriot from Wyeth again.

In looking over some of the things that the government will be checking, one of the questions says, is the person an unlawful user of any controlled substance? Most people don't put that down on the form and admit it. So are we then advocating that we do drug screening or drug testing periodically of employees that have these accesses?

MR. SPARKS: No.

MR. OBRIOT: So we just ask them, and if they say no--

MR. SPARKS: You know, I can't tell you what sources the Department of Justice has and what they'll be using to check. They may well ask the person that question, when they answer it or answer it truthfully, I don't know. But they way well ask the person that question in their application, and they have their sources for screening.
But we're not suggesting that the entity is responsible for this.

MR. OBRIOT: All right. Will there be any fees with these checks, do you think, with the FBI?

MR. SPARKS: I don't know. The only thing I do have a feel for here is that if you go to a local law enforcement to have your fingerprints taken and then sent, there's often a fee there that's charged by that local law enforcement, and that's their option, so there could be a fee. I think that's the most likely fee. Now, whether Justice charges something, I don't know.

MR. OBRIOT: So you anticipate that

fingerprints will have to be taken to be sent in?

MR. SPARKS: I anticipate that, yes.

MR. OBRIOT: Do you see any civil background being done, like checking for bankruptcies or that sort of thing? Strictly criminal?

MR. SPARKS: They have not told us all of their data sources and what they're going to check. But I think that's a possibility.

MR. OBRIOT: Thank you.

MR. GARCIA-RIVERA: Good afternoon. My name is Andy Garcia-Rivera. I am with Cornell University. I have a couple of questions.

On page 16 of the regulations on security risk assessments, I'm asking for your assistance in helping me identify in a larger institutional setting, not your mom and pop operation, who owns or controls the entity. What do you see as satisfying the ownership requirement?

For example, Cornell University or any other university, is it the board of trustees that we should to a background check on? Is it the

president? Just looking for some guidance.

MR. SPARKS: Well, again, this is back to--

Department of Justice will set their application

and what information you have to provide. But I don't think--this is a guess; I'm making a guess

for you, so don't hold me accountable--that there

will be a different set of questions for public

institutions versus a privately held one.

Now, I think if it's privately held, you may well be asked who is on your board of directors

or who owns or that sort of thing. But that's a

guess on my part, and I probably shouldn't be

making that guess.

MR. GARCIA-RIVERA: The interim regulations, they're written in the form of

performance standards. And a concern that I have

is that they're not specific enough, especially in

the area of security expectations and with those

investments an institution may have to make. Do you envision making additional changes in the

language to make sure that we are investing in the

right type of acceptable security systems?

MR. SPARKS: I don't think there are any plans to give any guidance beyond what's currently offered in appendix F and so forth that I'm aware of. But we certainly invite comment to the record. If you think, for instance, there ought to be more specificity in what we require, please make that comment to the record.

MS. BUCKLER: I'd like to add that for USDA, because we have indicated that we will provide technical assistance, if you would like us to review you plan to make sure that it's adequate before you start spending any money, we would be happy to do that.

MR. GARCIA-RIVERA: Okay. And one last question, this is looking into the future a little bit. What changes do you envision in the current grant application process, for example, with NIH grants, as a result of these regulations?

MR. SPARKS: I think what will happen, and there are people here who I will ask to correct me if I get it wrong. If you apply for a grant to work with one of these agents, I think you should

anticipate that one of the requirements in the grant is that you in fact are registered to work with the agent under the Select Agent Program.

MR. GARCIA-RIVERA: No other anticipated major changes?

MR. SPARKS: I will ask the panel if anybody else wants to respond to that?

A person did come forward.

MR. DIXON: We're working out the details of exactly what that will entail, but I think we all wish we were in a situation--

DR. OSTROFF: Dennis, can you identify yourself?

MR. DIXON: Yes, Dennis Dixon. I'm from the National Institute of Allergy and Infectious Diseases, and I'm chief of the bacteriology and mycology branch, where we have had many of the agents under past regulation and future and participated with the working group here.

So program officers making awards will be working with the awardees on what is involved there. We also have information on our Web site.

You can go to www.niaid.nih.gov and there are some specific sections in there stating what might be expected as we go through that. I think we're planning an update in the next newsletter that will say what we have come to conclusion on on guidance for that topic.

But basically with the award of NIH grants, the awardee needs to be in compliance with all attendant federal laws, which means that you would need to be in compliance with this one as well when the time comes that the new regulation is in effect and you're getting grants in that area.

MR. SPARKS: Thank you.

Okay, another question?

MR. PARENTI: I just had a last clarification. My question is to clarify a remark made by Mr. Holt regarding the HHS's process for appealing approvals. You stated, I believe, that if someone had a felony that was a number of years ago that was unrelated, I guess to biosecurity, that the secretary may make a decision to approve that person?

MR. HOLT: All I said was that was an example of something you might submit as a matter of mitigation. You might come back and say I was never convicted of a felony, or if you were in fact, you might come back and say I was, but it shouldn't be held against me at this point in life.

And by the fact I'm using that as an example shouldn't be--you shouldn't read anything into it.

The Department of Justice and the secretary of Health and Human Services may say that doesn't matter, it's still serious enough and, therefore, you don't have access.

MR. PARENTI: The reason I bring it up is because the Patriot Act states that a restricted person is somebody who has committed a felony, and that person, at least according to the Patriot Act, couldn't possess one of these materials.

MR. HOLT: You're right.

MR. SPARKS: Okay, we're coming close to the end of the allotted time, so if there's a question, please come forward.

MR. FINUCANE: Hi, I'm Matt Finucane from the University of Pennsylvania. I want to talk a little bit about access also.

From the standpoint of a question, I understand that it was explained that we're basically on our own hook as to defining access at our institution, making it institutionally appropriate, as I understood Ms. Levinson's answer.

If that's correct, how do I determine what is the appropriate education and experience for someone who may have access, and that could be housekeepers, maintenance staff? What sort of educational experience would they need to have access?

MS. LEVINSON: There's a section on training that defines, more or less, what the timing is, the requirements that everyone who is deemed to be necessary to have access to select agents would have to undergo.

In the discussions that we had in our Interagency Work Group, we defined access fairly broadly, which was that even if someone is not

working on an agent specifically but is in a laboratory where those agents are being used routinely, then they must be cleared. They are deemed to have access and must be cleared unless, as Mark said earlier, they are supervised by someone, there is someone there to monitor their activities while they're in that facility.

And all the elements that are part of the security plan should be included in the training, and that's part of your plan, too.

MR. FINUCANE: But I guess that doesn't really answer my question with regards to the education and experience for someone to have access. I just clearly don't understand what the hell it's doing there, for one, because there are all sorts of people who may have access to a facility, such as maintenance staff, glass washers. I need to know what sort of education and experience they need to have access to a select agent, not saying that they are actively working with it. I'm not saying it's a scientist or a research specialist who's working in a laboratory,

but access.

MS. LEVINSON: Well, I think you're going to have to determine--what the rule says is that provisions must be made for routine maintenance, for example, to be done. You have the option of determining whether those people need to go through the background check, which would be--and we've said that it's the background check on the individuals that really is the heart of your security plan--to determine that those people are trustworthy.

As far as the training goes, that still is going to be something that you decide is appropriate, depending on how you define and determine who is going to be in those containment facilities. And the training will be based on that for each individual.

Obviously there is professional training that you will want to provide to the people who are working with the agents. That's both safety and security training. And those are defined through the BMBL and appendix F for safety and security.

And then for individuals who are going to be within those facilities but are not working with the agents, you're going to have to decide what provides you with the ultimate security, and it will be part of your training plan.

MR. FINUCANE: So it's our decision.

MS. LEVINSON: But that decision will be reviewed as part of--yes. First, yes, that's right. But it will be reviewed as part of your security plan, and it will be decided whether or not that's adequate.

MR. FINUCANE: Okay.

MS. LEVINSON: If you think that that's not sufficient guidance for you, after you have looked at appendix F as well, then you should put that in your comments.

MR. FINUCANE: Okay. Thank you.

MR. SPARKS: Thank you.

Other questions? If anyone else anticipates a question, I'd ask you to come on down now and queue up here, because we're about to conclude.

MR. RAISBECK: Merl Raisbeck, University of Wyoming.

I've got one that isn't the Department of Justice--

[Laughter.]

MR. RAISBECK: Two kind of real dumb sort of questions. The list that you just passed out mentions bovine spongiform encephalopathy "agents." Are you anticipating that to include chronic wasting? That would be number one.

DR. SPENCER: Not currently, no.

MR. RAISBECK: Okay.

And secondly, I notice that there was an exclusion for agents that are in their natural environment or something to that effect. So how would that be interpreted? If a researcher obtained some cattle that were infected with MCF, which is endemic in our area, and brought them onsite, are they going to have to be inside of the lock within the lock within the lock? Or can we just keep them out back in the pasture like they were when we found them?

DR. SPENCER: In that example, you'd be able to keep them as they were, but only the exotic strains are going to be on--

MR. RAISBECK: Right, okay, so if we were to infect--

DR. SPENCER: If you had some with brucella, you could move that herd without having to have--

MR. RAISBECK: I was thinking of MCF, particularly. But we've got--well, you're aware. We've got brucella around the state anyway. But MCF, for example, would be, you know, there's a herd about 10 miles up the road from my facility. If we infected animals with that same strain--in other words, brought it from that ranch onto the research farm--is that now a select agent?

DR. SPENCER: As long as it's not an exotic strain to the U.S., it's not. It's not on that list.

MR. RAISBECK: Okay, thanks.

MR. SPARKS: All right, last call.

Okay, this will then be the last question.

MR. DURHAM: Thank you very much. Mike Durham from LSU in Baton Rouge.

In the requirements, it lists--and specifically, unless we go beyond this, and I don't know how you go beyond this and are getting equivalent of this--require the inspections of all packages upon entry and exit.

Is this written--this is no longer performance, right? In other words--

MR. SPARKS: That's pretty specific.

MR. DURHAM: --every package that goes in and out has to be inspected.

And who can do that? Can I ask that question?

MR. HEMPHILL: I'll start and Rachel can correct me if I'm wrong.

The intent of what that statement is about is knowing--the expectation that the package is something that you're expecting to be delivered. An unknown or suspicious package you don't want to bring into a containment area.

MR. DURHAM: Okay.

MR. HEMPHILL: So the purpose here is really from a security point of view to know what you're bringing into the containment area. And if it's a package that you weren't expecting to validate, that in fact that's the appropriate package and you simply haven't been notified, before you bring that into the containment area--it goes to concerns of potentially--bombs and things of that nature.

MR. DURHAM: Okay, it's suspicious packages coming in, but it indicates here upon not only entry but also exit.

MR. HEMPHILL: I'm not sure on that what it was getting to, except perhaps potentially theft.

MS. LEVINSON: Also assuring yourself that it's properly packaged and that it's going to a facility that is registered. These are already required. That's one of the elements, I think, from the previous transfer law rules that were picked up.

MR. DURHAM: This is just one that's going

to be difficult in a multipurpose building, where a portion of the building is used for research and the rest of the building is a public facility. It's going to be hard to monitor this.

Thank you very much.

MR. SPARKS: All right thank you very much for your questions.

This is Dr. Nesby, who is one of the authors. Do you mind coming to the microphone, because we just want to make sure that everybody heard your comment.

DR. NESBY: I just wanted to make sure that everyone understands that we're--with the intent of knowing what's coming and going out of the facilities, for the packages coming in, we were not trying to imply that those packages should be opened under inappropriate settings or inappropriate ways.

If you go to appendix F, it gives you a little bit more guidance as to what the expectations are with that.

MR. SPARKS: There's a copy on the table

outside, and you can sign up if you haven't seen it, and we'll send you a copy.

DR. NESBY: Appendix F is provided as guidance, but we provided a little bit more detail to help you understand the intent.

And, Larry, if I can make one more comment while I'm up here, I've had a lot of sidebar discussions with folks about how they're accumulating these databases within their facilities and record-keeping on their select agents. And I would just caution, from the security side, to monitor how you're keeping your records and how you're keeping your database and how secure they are.

A lot of facilities are saying that they're putting them on LANs, so that their different laboratories can feed into them. Is your LAN secure? Can it be breached? And from that perspective, do some internal housekeeping on your record-keeping and your databases, as you bring this stuff together.

MR. SPARKS: Okay, thank you.

I would like to just repeat the theme, that we are in fact very interested in your comments and concerns, and the record is open. Please give us your written comments and concerns.

DR. OSTROFF: I would only add to that that particularly in those areas of the preamble where we are soliciting feedback and comments from the user community, we really are seeking feedback and comments.

MR. SPARKS: Okay, there are no additional requests for comment, public comment, oral testimony, if you will, so we will not have that session after a break. We will in fact conclude.

Thank you very much for your attendance.

[Whereupon, at 2:55 p.m., the meeting concluded.]